IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 512 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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ABDUL RAWOOF @ RAWOOF ABDUL KADAR

Versus

STATE OF GUJARAT

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Appearance:

1. Special Criminal Application No. 512 of 2004

SHAUKAT A SHAIKH for Petitioner No. 1

MS. HB PUNANI, ADDL. PUBLIC PROSECUTOR for Respondent No. 1

..... for Respondent No. 2

NOTICE SERVED BY DS for Respondent No. 3

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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 29/12/2004

ORAL JUDGEMENT

1. Heard Mr.Shaukat A.Shaikh, learned counsel for the petitioner. The petition was received by the Court from Jail Authorities, but thereafter, Mr.Shaukat A.Shaikh made appearance and ultimately, filed his appearance and, therefore, he is heard for the petitioner on merit.

2. The reply affidavit filed by the State of Gujarat and rejoinder affidavit submitted by the petitioner is taken on record whereby, the petitioner has attempted to respond to the facts disclosed in the reply affidavit, qua 9 different offences that have been referred in the reply affidavit.

3. By invoking jurisdiction of the Court under Article 226 of the Constitution of India, the petitioner has assailed the legality and validity of the order passed by the State Government. In exercise of powers vested with it under Section 268 of the Code of Criminal Procedure. Having considered the nature of submission made before the Court by learned counsel Mr.Shaikh as well as learned A.P.P. Ms.Punani, it emerges that matter is based on the language of the order passed and the facts considered by the authority while passing the order under Section 268 of the Code of Criminal Procedure. It is not a matter of dispute that when the order came to be passed, the accused was facing more than one prosecution, but the order under Section 268 of the Code of Criminal Procedure is passed in reference to the registration of the offence registered by D.C.B. P.S.I. being CR No.11/94. Undisputedly, the petitioner has been granted bail by the Hon'ble the Apex Court for the vary offence i.e. offence registered by D.C.B. P.S.I. CR No.11/94 on 14th November 2002. Out of 9 offences, in 7 other offences, the petitioner is either granted bail by the competent Court or he has been acquitted by the competent Court on conclusion of the trial. It is mentioned in the rejoinder affidavit that he has been declared acquitted in 3 such offences and he is enjoying bail in other 5 offences. The petitioner accused has been held guilty of the offence punishable under Section 302 registered by Dariapur Police Station being CR No.I 91/94. The say of the petitioner is that, as the State Government has passed the order under Section 268 of the Code of Criminal Procedure, he is not granted bail.

4.(i) Learned A.P.P. Ms.Punani strongly resisted the submissions that the fact of existence of the order passed by the State Government under Section 268 of the Code of Criminal Procedure, has been considered merely

while dealing with the bail application by the Appellate Bench when the bail plea was pressed into service after conviction. According to her, the bail plea was not found acceptable on its own merits, i.e. on more than one ground. Existence of an order under Section 268 of the Code of Criminal Procedure is one of the ground looked into by the learned Division Bench and for the purpose, she has taken me through the order passed by the learned Division Bench, rejecting the bail plea.

(ii) The Court is in agreement with submissions of Ms.Punani that it will be wrong to accept that the petitioner has not been granted bail, where the petitioner has been held guilty of serious offence punishable under Section 302 of the Indian Penal Code, merely because there is an order under Section 268 of the Code of Criminal Procedure for the crime registered with Dariapur Police Station (i.e. I 91/94)

5. The grievance of the present petitioner, as expressed by Mr.Shaikh is that, even for the sake of argument, it is accepted that the bail plea was not accepted only on the ground that there is an order under Section 268 of the Code of Criminal Procedure by the State Government, but especially when the Hon'ble the Apex Court has enlarged the present petitioner on bail, in the very offence i.e. I 91/94, the petitioner is tempted to assail the order in its legality after several years and there is nothing wrong in doing so.

6. It is true that the petitioner has failed in assailing the validity of the order well in time. Normally, an order should be brought under judicial scrutiny in reasonable period of time and if the delay in doing so is caused, then it should be reasonably explained. The question, need to be addressed, would be, whether the petition should be dismissed on the ground that the accused has filed the present petition at a belated stage, (i.e. filed after laps of approximately 8 years). The Court finds that there is some logic in say of Mr.Shaikh that as the accused was facing serious charge of offence punishable under Section 302 of the Indian Penal Code and he was not enlarged on bail in the main of say more serious crime where the order under Section 268 of the Code of Criminal Procedure is passed till November 2002, it was not legally advisable for the petitioner to approach this Court, assailing the validity of the order. While dealing with the point of delay, then the date of grant of bail by the Hon'ble the Apex Court should be considered as date more relevant and not the actual date of passing of the order. It is rightly

argued that, even there was an order under Section 268 of the Code of Criminal Procedure, the Hon'ble the Apex Court has granted bail and on that day, the petitioner was held guilty of serious charge of the offence punishable under Section 302 of the Indian Penal Code. So, the Court is not inclined to dismiss this petition merely on the ground that the petition is a belated petition. Such an application received from Jail Authority, if needs some consideration, then it should not be thrown out on technical ground of delay, when there is a favourable order of the Hon'ble the Apex Court passed on 14th November 2002.

7. Mr.Shaikh has placed reliance on the decision of Punjab & Haryana High Court in the case of Bhajan Vir Singh & Ors. Vs. State of Haryana, reported in 1991 CRI.L.J. 1311. To appreciate the say of Mr.Shaikh, I would like to reproduce the order dated 30.08.1996, passed by the State Government, which is under challenge:

"No.SBII/TDA/6096/1 :- Whereas

1. Ahemadbhai @ Ibrahim Shaikh @ Ibrahim Penter CR No.24/93
2. Ahemad @ Baher @ Burbhai Shaikh CR No.161/93.
3. Abdul Sattar @ Sattar Betri S/o ASbdul Gani CR No.11/94.
4. Abdul Rahim @ Babu Khundo S/o Mahmadmiya CR No.116/92.
5. Abdul Rauf @ Rauf S/o Abdul Kadar CR No.11/94.
6. Mahmad Rafik Abdul Karim Shaikh CR No.60/95.
7. Musakhan @ Balikhan S/o Ismil CR No.284/93.
8. Maahemud Pipa Pahelvan S/o Husenkhan CR No.11/94.
9. Masabhai Usufbhai Mandli CR No.11/94.
10. Samimulla @ Sammu S/o Mahmad Safiulla CR No.11/94.
11. Sabbirhusen Rusenmiya Shaikh CR No.254/92.
12. Anvarullakhan @ Imtiyajulla S/o Mahmadullakhan CR No.11/94.
13. Sahubyuddin @ Tamijbava S/o Badrudin CR No.11/94.
14. Dayanandsing Ramkuvarsing CR No.197/92.
15. Subhashsing Raghunathsing CR No.197/92.
16. Bharatbhai @ Jimmi S/o Premchand Patel CR No.197/92.

17. Ramdularsing Raghunathsing CR No.197/92.
18. Jahangir Marjban (Parsi) Patel CR No.60/94.
19. Hafiuddin Fajluddin CR No.11/94.
20. Husenbhai @ Bhajiya S/o Mahmadbhai CR No.11/94.
21. Yasinbhai Haveliwala Chhipa CR No.284/93.
22. Najirmahmad Alimahmad Vora CR No.92/94.
23. Tajbul Ali Hasan Ansari CR No.254/92

have been detained in connection with offences registered against them.

And whereas they are at present in Central Prison, Ahmedabad.

Now, therefore, in exercise of the powers conferred by sub-section (1) of Section 268 of the Criminal Procedure Code, 1973, the Government of Gujarat hereby having regard:

(a) the nature of the offences for which or the grounds for which, the said persons have been ordered to be confined or detained in prison.
(b) the likelihood of the disturbance of public order if the said persons are allowed to be removed from the prison and
(c) the public interest, generally, directs that they shall not be removed from the Ahmedabad Central Prison, Ahmedabad."

The order referred to by the Apex Court in the case of Bhajan Vir Singh (Supra) reads as under:

"Whereas the persons mentioned in the schedule given below have been confined in the Jails shown against their names as under-trials in connection with various offences indicated against their names:

And whereas having regard to the nature of the offences for which they have been ordered to be confined and from the material placed before him the Governor of Haryana is satisfied that there is likelihood of the disturbance of public order of the persons mentioned in the said schedule are allowed to be removed from the Jail (prison).

Now, therefore, in exercise of powers conferred by S.268 of the Code of Criminal Procedure, 1973, the Governor of Haryana hereby directs that till

further orders, the persons mentioned in the said schedule shall not be removed from the Jails in which they are confined."

The State Government had annexed the schedule in a tabular form, but in the case on hand, the State Government of Gujarat has mentioned the name of the accused in the order and the relevant Crime Resister number is mentioned against the name of the accused. So, there is no formal annexure or schedule in the order passed by the State Government. Otherwise, both orders are paramataria and similar. But, attention of this Court has been drawn by Mr.Shaikh to a decision of the Madras High Court, where the learned Single Judge was dealing with the similar petition filed by one Mohammed Ansari & Ors. reported in 2003 Cri.L.J. 524. This decision deals with petitioners, against whom the order under Section 268 of the Code of Criminal Procedure was passed by the Tamilnadu Government, who were found involved in Coimbatore bomb blast case. The Madras High Court placing reliance on the decision of the Hon'ble the Apex Court in case of Bhajan Vir Singh (Supra) has allowed the petition and decided to quash and set aside the order passed by the State Government, being unreasoned order. For the sake of convenience, the Court would like to reproduce the relevant observations made in the case of Bhajan Vir Singh:

"the provisions of Section 268 of the Cr.P.C. conferring power on the State Government to exclude attendance of prisoner in Court are exceptional in nature as ordinarily the accused are produced before the concerned Courts on the relevant dates. These provisions had to be construed strictly."

"A glance through the provisions of sub-sec.(2) of this section leaves absolutely no doubt that before making an order under sub-sec.(1), the State Government shall have regard to the nature of the offence for which, or the grounds on which, the persons or class of persons has been ordered to be confined or detained in prison: the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison: and the public interest, generally. Thus there is no doubt that the State Government has to apply its mind to all these factors before passing any order u/S.269 of

> Cr. P.C. The law is well settled that in such like cases, the application of mind to the facts of the case should be apparent from the very reading of the impugned order or in other words, it can be well said that in such like cases, the impugned order should be self-contained and speaking one."

The above observations of the Hon'ble the Apex Court are in background of one another judgment of the Hon'ble the Apex Court in the case of Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., reported in AIR 1978 Supreme Court 851. The order under scrutiny before the Madras High Court was of similar type that of Gujarat Government, challenged by the present petition.

8. Say of learned A.P.P. Ms.Punani is that while dealing with similar type of order, this Court in the case of Anirudhsinh Mahipatsinh Jadeja Vs. State of Gujarat & Ors., reported in 2003 (1) G.L.H. (U.J.) 1 has held that:

> "In the background of office notes and other material on record, the impugned order is found to have been based on subjective satisfaction on objective material and order cannot be said to be nom-speaking one and without any reason."

The ratio of the decision is that it is not always necessary to assign detailed reasons while passing the order under Section 268 of the Code of Criminal Procedure. The say of Ms.Punani shall have to be accepted that while passing the order under Section 268 of the Code of Criminal Procedure, the authority and the State Government is not suppose to assign reasons or it should not be compulsory order, stating reasons or the grounds upon which, the authority has recorded its subjective satisfaction and, therefore, accepting this argument, this Court has also seen the original file that is brought before the Court for perusal by learned A.P.P. and she has shown certain documents including the original proposal made in the month of January 1996 for certain numbers of accused persons, who are required to be placed under the orders for whom order under Section 268 of the Code of Criminal Procedure is required to be passed and after some exercise between the authority proposing to the Government and the authority taking

decision, the order under challenge has been passed, was according to Ms.Punani, this is not a case of non-application of mind at all, but it is relevant to note that till June 1996, the name of the petitioner is nowhere reflecting in the correspondence. On the other hand, in the case of Anirudhsinh Mahipatsinh Jadeja (Supra), the learned Single Judge has positively observed in paragraph 5 of the decision that the order was reflecting two materials relevant and important things. The order in the case of cited decision reveals that the authority had taken into account two communications received by the State one from the Commissioner of Police dated 20th October 2000. On the other hand, the present order under challenge does not reflect anything which can be said to be relevant in passing the order under Section 268 of the Code of Criminal Procedure against the present petitioner. It is true that the decision of the learned Single Judge was assailed by the petitioner - Anirudhsinh by way of intra Court appeal and the learned Division Bench, dealing with Letters Patent Appeal has confirmed the findings recorded by the learned Single Judge, but as the order scrutinized by the learned Single Judge and confirmed by the learned Division Bench was to be of different type and it was bearing some material that was looked into by the authority while passing the order under Section 268 of the Code of Criminal Procedure, so the learned Single Judge in the case of Anirudhsinh Mahipatsinh Jadeja (Supra) was able to draw distinction between the facts in case of Bhajan Vir Singh (Supra) and the petitioner Anirudhsinh Jadeja. But, this Court is not able to draw such distinction. But when this Court is not able to draw such distinction even after plain reading of both these orders and referred the file that has been produced before the Court by the learned A.P.P., the decision of the Hon'ble the Apex Court shall have to be followed and that too, when a decision which is parasite value of Madras High Court is very well there for further assistance. So, the Court is inclined to allow this application and the order passed by the State Government under Section 268 of the Court of Criminal Procedure, qua the present petitioner is held to be unreasoned order therefore, the same should be quashed. However, it is clarified that in view of the nature of number of offences registered against the present petitioner and the fact that he has been held guilty of the offence under Section 302, Indian Penal Code, it will be open for the State Government, if so desires, to pass a fresh reasoned order under Section 268 of the Code of Criminal Procedure and the present decision shall not become embargo in taking appropriate decision, if the State so desires. In view of the above, petition is

allowed. Rule is made absolute. Direct service is permitted.

(C.K.Buch, J.)

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